

1 John L. Cooper (State Bar No. 050324)
2 jcooper@fbm.com
3 Farella Braun + Martel LLP
4 235 Montgomery Street, 17th Floor
5 San Francisco, California 94104
6 Telephone: (415) 954-4400
7 Facsimile: (415) 954-4480

8 Special Master

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WAYMO LLC,

Plaintiff,

vs.

UBER TECHNOLOGIES, INC. *et al.*,

Defendants.

CASE NO. 3:17-cv-00939

**[PROPOSED] ORDER RE: SPECIAL
MASTER'S MONITORING AND
VERIFICATION PROTOCOL**

Pursuant to the Court's May 20, 2017 Order (ECF No. 482), the Special Master and counsel for all parties conferred to agree upon a revised version of the Special Master's proposed monitoring and verification protocol required by the Court's May 11, 2017 Order (ECF No. 426). As a result of those efforts, the parties agreed upon the following protocol.

The specific provisions of this protocol, including all references to Required Disclosures, as defined below, are intended to help the Special Master and the Court evaluate whether Defendants Uber Technologies, Inc., Ottomotto, LLC, and Otto Trucking, LLC (collectively "Defendants") have complied with the Court's May 11, 2017 Order. The provisions of this protocol, including the Required Disclosures, are not intended to alter the May 11 Order.

1 **I. SPECIAL MASTER'S EX PARTE COMMUNICATIONS WITH DEFENDANTS**

2 Paragraph 7 of the May 11, 2017 Order (the "May 11 Order" or the "Order") provides in
 3 part:

4 Defendants shall keep complete and accurate records of their
 5 compliance with all of the foregoing requirements, including
 6 directives given to Anthony Levandowski and others. The special
 7 master shall monitor and verify said compliance.

8 The Court has previously ordered that the Special Master "shall not engage in substantive
 9 ex parte communications with the Court or with the Parties except as ordered by the Court or as
 10 agreed by the parties." ECF No. 235 at 2.

11 The parties have agreed, and the Court likewise finds, that Special Master must engage in
 12 limited *ex parte* substantive communications with Defendants, including their officers and
 13 employees, in order to monitor and verify their compliance with the May 11 Order. Accordingly,
 14 it is hereby ordered that Special Master and his assistants may, pursuant to the below protocols,
 15 unilaterally interview Defendants and their employees and may engage with Defendants' counsel
 16 to review and analyze Defendants' efforts to comply with the Order. Any action taken by the
 17 Special Master pursuant to the protocols is not subject to any promise of confidentiality. For
 18 example, if the Special Master interviews an employee of Defendants, he must disclose the
 19 contents of that interview to Plaintiff as needed or as the Court requires.

20 Defendants shall promptly notify Plaintiff of all *ex parte* communications, including the
 21 nature of the communication (for example, telephonic conference), the duration (if oral), the
 22 participants, and the general subject matter. To the extent the Special Master engages with
 23 Defendants' counsel only (as opposed to interviewing Defendants' officers and employees), the
 24 Special Master shall attempt to include counsel for Plaintiff in the communication when possible.

25 Special Master and his assistants shall have immediate and constant access to the records
 26 of compliance the Court has ordered Defendants to compile. If the Special Master determines that
 27 Defendants' efforts to comply with the May 11 Order are inadequate in any way, he will have the
 28 authority to confer with all parties about his initial determinations and request immediate

1 correction of any identified deficiencies. Any refusal by Defendants to bring their conduct or
 2 records into conformance with the Special Master's comments shall be reported to the Court.

3 As part of his discussions with the parties about Defendants' compliance with the May 11
 4 Order, the Special Master will have the discretion to share with Plaintiff any information or
 5 documents that Defendants provide the Special Master pursuant to this Proposed Order and/or the
 6 May 11 Order. Subject to the 24-hour notice provision below, and the other provisions of this
 7 protocol, the Special Master will share with Plaintiff certain information that Defendants shall
 8 provide to the Special Master specific to Defendants' compliance or non-compliance with the
 9 Court's Order, as set forth below ("Required Disclosures"). The Required Disclosures are required
 10 only by this Proposed Order and protocol, and Defendants shall be required to provide the
 11 information to the Special Master as set forth below. The provisions of this protocol, including the
 12 Required Disclosures, are not intended to alter the May 11 Order or to suggest that all of the
 13 conduct suggested by the Required Disclosures must be carried out for Defendants to comply with
 14 that Order.

15 The Special Master shall not share with Plaintiff the information or documents the Special
 16 Master obtains from Defendants, including the Required Disclosures, under this Proposed Order
 17 and protocol until he first notifies Defendants of his intent to do so and allows Defendants
 18 reasonable time, not to exceed 24 hours, to determine whether to make any confidentiality
 19 designations to the information under the protective order applicable to this case. For the
 20 avoidance of doubt, no action taken by the Special Master pursuant to the protocols, including but
 21 not limited to receiving information or documents from Defendants, is subject to any promise of
 22 confidentiality. For the purposes of this Proposed Order, the foregoing shall be referred to as
 23 the "Disclosure Protocol."

24 **II. PROHIBITION ON THE USE OF THE "DOWNLOADED MATERIALS" AND**
 25 **THEIR RETURN TO WAYMO**

26 The Court has ordered Defendants to "immediately and in writing exercise the full extent
 27 of their corporate, employment, contractual, and other authority to" prevent Anthony Levandowski
 28

1 and “all other officers, directors, employees, and agents of” Defendants from using the
 2 downloaded materials in any way (excepting their use by Defendants’ counsel and experts “in
 3 defending this civil action.” See ECF No. 426 at 23. The Court further ordered Defendants to
 4 “exercise the full extent of their corporate, employment, contractual, and other authority” to
 5 require Mr. Levandowski and “all other officers, directors, employees, and agents of” Defendants
 6 to return the downloaded materials to Plaintiff or the Court by noon on May 31, 2017. See *id.*

7 The Special Master’s monitoring and verification of Defendants’ compliance with this
 8 portion of the May 11 Order requires that:

- 9 1) Defendants shall immediately and continuously provide the Special Master the
 10 writings and communications Defendants are required to make to carry out this
 11 provision.
- 12 2) Defendants shall submit to the Special Master, by 2 p.m. on May 26, 2017, a
 13 detailed summary of all of Defendants’ efforts to comply with these requirements.
 14 They shall submit an updated summary to the Special Master by 2 p.m. on May 30,
 15 2017.
- 16 3) Upon his request to Defendants, Defendants shall immediately make their facilities
 17 available to the Special Master as per the May 11 Order, if deemed necessary to
 18 determine whether Defendants have complied with the Order.
- 19 4) If the Special Master determines that he must interview any of Defendants’
 20 employees or agents, including Anthony Levandowski, in order to verify
 21 Defendants’ compliance with this provision of the May 11 Order, Defendants shall,
 22 within 48 hours of the Special Master’s request, make the individual(s) available to
 23 the Special Master for an interview.
- 24 5) Subject to the Disclosure Protocol, the Special Master will share with Plaintiff the
 25 records of compliance submitted by Defendants, and to the extent such records are
 26 not shared, the Special Master will provide Plaintiff a description of the records and

1 an explanation for why the records were not shared, so that Plaintiff may have the
2 opportunity to request them and/or object to their being withheld.

3 6) Subject to the Disclosure Protocol, the Special Master shall have the discretion to
4 share with Plaintiff the Special Master's findings from any visit of Defendants'
5 facilities and will disclose any suspected violations or failure to comply with the
6 May 11 Order.

7 7) Subject to the Disclosure Protocol, the following are the Required Disclosures
8 under this Proposed Order and protocol that Defendants shall make to the Special
9 Master by May 25:

10 a) Whether Anthony Levandowski has permitted Defendants to inspect all
11 electronic devices in his possession, custody, or control, and certified in
12 writing that the electronic devices provided for inspection are in fact all
13 such devices;

14 b) Whether Defendants have inspected all of Anthony Levandowski's personal
15 electronic devices in order to locate the downloaded materials;

16 c) Whether Anthony Levandowski has certified in writing that he does not
17 have the downloaded materials;

18 d) Whether Anthony Levandowski has certified in writing that he will not
19 consult, copy, or otherwise use the downloaded materials;

20 e) Whether Defendants have required all officers, directors, and employees
21 who either 1) do or have done any work on behalf of any Defendant
22 pertaining to LiDAR; 2) were originally officers, directors, or employees of
23 Ottomotto or Otto Trucking; 3) were involved in any way with Uber's
24 acquisition of Ottomotto or the negotiations between Uber, on the one hand,
25 and Ottomotto or Otto Trucking, on the other, related to a potential
26 acquisition; or (4) were involved in the recruiting of Mr. Levandowski to
27 Uber whether through seeking acquisition of Ottomotto or Otto Trucking or

otherwise, to certify in writing that they do not have the downloaded materials;

f) By way of example only, if Anthony Levandowski refuses to certify in writing that he does not have the downloaded materials, and Defendants have not fired him, that would be a Required Disclosure.

8) Defendants shall immediately rectify any deficiencies the Special Master identifies in Defendants' compliance with the May 11 Order. The Special Master shall report to the Court any refusal by Defendants to do so.

III. REMOVAL OF ANTHONY LEVANDOWSKI FROM DEFENDANTS' LIDAR-RELATED ACTIVITIES

The Court has ordered Defendants to remove Mr. Levandowski “from any role or responsibility pertaining to LiDAR” and to “take all steps in their power to prevent him from having any communication on the subject of LiDAR with any officer, director, employee, agent, supplier, consultant, or customer of defendants.” See ECF No. 426 at 23. Defendants further must prohibit Mr. Levandowski “from consulting, copying, or otherwise using the downloaded materials in any way.” Id. For simplicity’s sake, this protocol and Proposed Order refers to these requirements as the “Levandowski Prohibitions.” Finally, Defendants must “instruct all their officers, directors, employees, agents, suppliers, consultants, and customers in writing” of the Levandowski Prohibitions and that the “officers, directors, employees, agents, suppliers, consultants, and customers” must notify the Special Master or the Court immediately of any suspected breach of the Levandowski Prohibitions.

The parties agree that Defendants need not notify all users of Uber's mobile application and/or other individuals who have no relation to the technology at issue in this case. Pursuant to the agreement of the parties, the Special Master envisions that Defendants will satisfy the May 11 Order's requirement to notify certain groups of individuals about the Levandowski Prohibitions if they instruct (1) all of Defendants' officers, directors, and employees; (2) anyone who acts in any way on Defendants' behalf with respect to any LiDAR-related activities; (3) any people or entities

1 who supply any products or services related in any way to the development, research, or use of
 2 LiDAR; and (4) any people or entities who purchase or otherwise obtain from Defendants any
 3 products or services related in any way to LiDAR.

4 The Special Master's monitoring and verification of Defendants' compliance with this
 5 portion of the May 11 Order, construed as discussed above, requires that:

- 6 9) Defendants shall immediately and continuously provide the Special Master the
 7 records of compliance required by the May 11 Order.
- 8 10) Upon his request to Defendants, Defendants shall immediately make their facilities
 9 available to the Special Master as per the May 11 Order, if deemed necessary to
 10 determine whether Defendants have complied with this Order.
- 11 11) If the Special Master determines that he must interview any of Defendants'
 12 employees or agents in order to verify Defendants' compliance with this provision
 13 of the May 11 Order, Defendants shall, within 48 hours of the Special Master's
 14 request, make the individual(s) available to the Special Master for an interview.
- 15 12) Subject to the Disclosure Protocol, the Special Master will share with Plaintiff the
 16 records of compliance submitted by Defendants, and to the extent such records are
 17 not shared, the Special Master will provide Plaintiff a description of the records and
 18 an explanation for why the records were not shared, so that Plaintiff may have the
 19 opportunity to request them and/or object to their being withheld.
- 20 13) Subject to the Disclosure Protocol, the Special Master shall have the discretion to
 21 share with Plaintiff the Special Master's findings from any visit of Defendants'
 22 facilities and will disclose any suspected violations or failure to comply with the
 23 May 11 Order.
- 24 14) Subject to the Disclosure Protocol, the following are the Required Disclosures
 25 under this Proposed Order and protocol that Defendants shall make to the Special
 26 Master (by May 25):

- 1 a) Whether all of the following have received written instructions of the
2 Levandowski Prohibitions: (1) all of Defendants' officers, directors, and
3 employees; (2) anyone who acts as Defendants' agent with respect to any
4 LiDAR-related activities; (3) any people or entities who supply any
5 products or services related in any way to the development, research, or use
6 of LiDAR ; and (4) any people or entities who purchase or otherwise obtain
7 from Defendants any products or services related in any way to LiDAR;
- 8 b) Whether Anthony Levandowski has any role or responsibility pertaining to
9 LiDAR, including third-party LiDAR or LiDAR data;
- 10 c) Whether Anthony Levandowski has any direct reports, or anyone in his
11 chain of command, with any role or responsibility pertaining to LiDAR;
- 12 d) Whether Anthony Levandowski has certified in writing that he will comply
13 with the Levandowski Prohibitions;
- 14 e) Whether Anthony Levandowski has authorization or access to any servers,
15 repositories, or systems that host LiDAR-related material;
- 16 f) Whether all servers, repositories, or systems that host LiDAR-related
17 material are password protected with a password that Mr. Levandowski is
18 prohibited from receiving;
- 19 g) Whether Defendants have de-authorized, barred, or otherwise prohibited all
20 of Anthony Levandowski's personal devices (i.e., those not issued and
21 controlled by Defendants) from accessing any of Defendants' networks,
22 servers, infrastructure, or systems.
- 23 h) Whether Defendants have instructed security and/or reception personnel at
24 each of Defendants' offices or facilities that hosts LiDAR-related personnel
25 or work that Anthony Levandowski must be searched before entering any
26 such premises and that personal devices must be confiscated and not
27 allowed into the office or facility;

15 | IV. DEFENDANTS' DETAILED ACCOUNTING

16 The Court has ordered Defendants to undertake a “thorough investigation [into] and
17 provide a detailed accounting under oath” of “every person who has seen or heard any part of any
18 downloaded materials, what they saw or heard, when they saw or heard it, and for what purpose.”
19 ECF No. 426 at 24. The accounting, as further described in the May 11 Order, must be filed by
20 noon on **June 23, 2017**. *Id.*

21 The Special Master's monitoring and verification of Defendants' compliance with this
22 portion of the Order requires that:

23 16) Defendants shall continuously provide the Special Master a roster of the individuals
24 Defendants have interviewed.

25 17) Until the accounting is filed, Defendants shall submit to the Special Master, by 2
26 p.m. every Tuesday and Friday, a detailed summary of all Defendants' efforts to
27 comply with these requirements.

- 18) Upon his request to Defendants, Defendants shall immediately make their facilities
2 available to the Special Master, as per the Order, if deemed necessary to determine
3 whether Defendants have complied with this Order.
- 4 19) If the Special Master determines that he must interview any of Defendants'
5 employees or agents in order to verify Defendants' compliance with this provision
6 of the May 11 Order, Defendants shall, within 48 hours of the Special Master's
7 request, make the individual(s) available to the Special Master for an interview.
- 8 20) Subject to the Disclosure Protocol, the Special Master will share with Plaintiff the
9 records of compliance submitted by Defendants, and to the extent such records are
10 not shared, the Special Master will provide Plaintiff a description of the records and
11 an explanation for why the records were not shared, so that Plaintiff may have the
12 opportunity to request them and/or object to their being withheld.
- 13 21) Subject to the Disclosure Protocol, the Special Master shall have the discretion to
14 share with Plaintiff the Special Master's findings from any visit of Defendants'
15 facilities and will disclose any suspected violations or failure to comply with the
16 May 11 Order.
- 17 22) Subject to the Disclosure Protocol, the following are the Required Disclosures
18 under this Proposed Order and protocol that Defendants shall make to the Special
19 Master (by June 8):
 - 20 a) Whether Defendants have interviewed in connection with this accounting 1)
21 every person on any of Defendants' privilege logs; 2) every employee of
22 Defendants who has, at any time, worked for Ottomotto LLC or Otto
23 Trucking LLC; 3) every officer, director, employee, and agent of
24 Defendants who has ever performed any work on behalf of Defendants
25 related in any way to the development, research, or use of LiDAR; and 4)
26 every officer, director, employee, and agent of Stroz Friedberg who
27 performed any work related to the Due Diligence Report.

11 V. **DEFENDANTS' LOG OF MR. LEVANDOWSKI'S COMMUNICATIONS
REGARDING LIDAR**

Finally, the Court has ordered Defendants to compile and serve on Plaintiff a log “of all oral and written communications . . . wherein Anthony Levandowski mentioned LiDAR to any officer, director, employee, agent, supplier, or consultant of defendants.” ECF No. 426 at 25. The chronological account, here called the “Levandowski Log,” must be served on Plaintiff by noon on **June 23, 2017**. Id.

18 The Special Master's monitoring and verification of Defendants' compliance with this
19 portion of the Order requires that:

20 24) On Wednesday, May 24, 2017, and every Wednesday thereafter until service of the

21 Levandowski Log, Defendants shall submit to the Special Master a detailed

22 summary of all Defendants' efforts to comply with these requirements and the

23 chronology as it exists at the time of the update to the Special Master.

24 25) If the Special Master determines that he must interview any of Defendants'

25 employees or agents in order to verify Defendants' compliance with this provision

26 of the May 11 Order, Defendants shall, within 48 hours of the Special Master's

27 request, make the individual(s) available to the Special Master for an interview.

1 26) Subject to the Disclosure Protocol, the Special Master will share with Plaintiff the
 2 records of compliance submitted by Defendants, and to the extent such records are
 3 not shared, the Special Master will provide Plaintiff a description of the records and
 4 an explanation for why the records were not shared, so that Plaintiff may have the
 5 opportunity to request them and/or object to their being withheld.

6 27) Subject to the Disclosure Protocol, the Special Master shall have the discretion to
 7 share with Plaintiff the Special Master's findings from any visit of Defendants'
 8 facilities and will disclose any suspected violations or failure to comply with the
 9 May 11 Order.

10 28) Defendants shall continuously provide the Special Master a roster of the individuals
 11 Defendants have interviewed.

12 29) Subject to the Disclosure Protocol, the following are the Required Disclosures
 13 under this Proposed Order and protocol that Defendants shall make to the Special
 14 Master (by June 8):

15 a) Whether Defendants have interviewed in connection with this accounting 1)
 16 every person on any of Defendants' privilege logs; 2) every employee of
 17 Defendants who has, at any time, worked for Ottomotto LLC or Otto
 18 Trucking LLC; 3) every officer, director, employee, agent, supplier, or
 19 consultant of Defendants who has ever performed any work on behalf of
 20 Defendants related in any way to the development, research, or use of
 21 LiDAR; and 4) every officer, director, employee, and agent of Stroz
 22 Friedberg who performed any work related to the Due Diligence Report.

23 b) Whether Defendants have reviewed, in connection with this accounting,
 24 every written communication in Defendants' possession, custody, or control
 25 between Anthony Levandowski and any person, and every document
 26 written by, contributed to, or otherwise authored by Anthony Levandowski.

27

28

